UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Boralex Livemore Falls, Inc.	)	Docket Nos.	ER01-2569-005
Boralex Stratton Energy LP	)		ER98-4652-005
Boralex Ft. Fairfield LP	)		ER02-1175-004
Boralex Ashland LP	)		ER01-2568-004

REQUEST FOR REHEARING OF THE MAINE PUBLIC UTILITIES COMMISSION

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 8251 (2000), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2007), the Maine Public Utilities Commission ("MPUC") respectfully submits this Request for Rehearing of the Commission's "Order Accepting Updated Market Power Analysis"[1] issued in the above-captioned proceeding on January 17, 2008.

I. BACKGROUND

On June 29, 2007, Boralex Industries Inc. ("Boralex") submitted its June 29 Filing in compliance with the triennial rate review requirement imposed by the Commission's orders in the above-captioned dockets, which granted authorizations to sell power at market-based rates to four Boralex subsidiaries that own interests in biomass-fueled qualifying small power production facilities with generation capacities in excess of 20 MW (the "Boralex Large QFs").[2] In its June 29 Filing, Boralex stated that it used the

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1 *Boralex Livermore Falls, LP, et al.*, 122 FERC ¶ 61,033 (2008)("January 17 Order").

2 *See* June 29 Filing at 1.

Commission's interim market power screens as set forth in *AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 (2004) ("Interim Screen Order") as the basis for its market power analysis, and asserts that it is in compliance with the Commission's interim market power screens for potential market power.[3] Accordingly, Boralex requested that the Commission grant the Boralex Large QFs continued market-based rate authorization.[4]

The MPUC timely filed a notice of intervention and protest on July 20, 2007. On August 6, 2007, Boralex filed a motion for leave to answer and answer to the MPUC's protest. On August 7, 2007, Integrys Energy Services, Inc. ("WPS/Integrys") filed a motion to intervene out-of-time and answer.

Among other things, the MPUC requested that the Commission convene a technical conference to address issues raised in its protest. The Commission held a technical conference on August 29, 2007, and invited all parties and interested persons to attend.[5] The Commission specified that the conference would address the following issues: (1) what is the relevant geographic market for Boralex's market power analysis; (2) whether Boralex should be allowed to deduct long-term firm non-requirements capacity in its market power analysis; (3) whether uncommitted capacity from Boralex's remote generation in the ISO New England Inc. ("ISO-NE") market should be considered in its market power analysis; (4) how transmission import capacity into northern Maine should be allocated; and (5) why the Boralex Sherman plant is currently mothballed. Representatives of Boralex, the MPUC, WPS/Integrys, and the Northern Maine ISA attended the conference.

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3 *See id.*

4 *See id.*

5 Notice of the technical conference was published in the *Federal Register*, 72 Fed. Reg. 45,807 and 49,278 (2007).

Following the technical conference, the MPUC filed supplemental comments. Northern Maine ISA subsequently filed a motion to intervene out of time and reply comments. Boralex also filed reply comments. The MPUC filed a further response.

On January 17, 2008, the Commission issued the January 17 Order, in which it accepted the updated market power analysis filed by Boralex, finding that Boralex satisfied the Commission's standards for market-based rate authority.

II. SPECIFICATION OF ERROR

In accordance with Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 713(c)(1) (2007), the MPUC specifies the following error in the Commission's January 17 Order:

1. The Commission erred in rigidly applying Order 697 to a situation where the consequence of such application creates the conditions for unjust and unreasonable rates.

III. STATEMENT OF ISSUE

In accordance with Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(1) (2007), and Order No. 663-A,[6] the MPUC specifies the following issue for which it requests rehearing:

1. Whether the Commission erred in rigidly applying P 268 of Order 697 to a situation where the consequence of such application creates the conditions for unjust and unreasonable rates. Since the Commission is bound to ensure that rates are just and reasonable, the answer to this question is yes. *See* Section 205 of the FPA.

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6 *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 114 FERC ¶ 61,284 (2006).

IV. REQUEST FOR REHEARING

In its January 17 Order, the Commission found that Boralex satisfied its standards for market-based rate authority, explaining that it examined Boralex's filing based on the market-based rate analysis in effect at that time (the Interim Screen Order), but noting that Boralex is subject to the requirements of Order 697[7] as of the effective date of Order 697. *See* January 17 Order at 1 and fn 1.

Specifically, the Commission found that:

> [i]n the instant filing, the Maritimes Control Area is the control area for the Northern Maine area, and the New Brunswick System Operator is the Balancing Authority for several entities in the Maritimes Control Area, including the Northern Maine ISA. Thus, under our precedent, we find that the Maritimes Control Area is the default relevant geographic market....

Id. at P 32 (internal citations omitted).

The Commission concluded that it found that the Maritimes Control Area was the default relevant geographic market, and that the MPUC "failed to provide sufficient evidence that some other geographic market should be considered as the relevant market." *Id.* The Commission further stated that:

> [w]hile the Commission considers arguments for a broader or smaller market definition, consistent with our policy in Order No. 697, any proposal to use an alternative geographic market must include "a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market." The requirement to address transmission constraints was found to be a "necessary condition" for those advocating adoption of an alternative geographic market.

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7 *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) ("Order 697").

> Although the Maine Commission argues for an alternative geographic market, i.e., Northern Maine, it fails to meet our requirements for defining such a market because it has presented no data showing the existence of binding transmission constraints. Indeed, the Maine Commission even concedes that there are no transmission constraints between Northern Maine and the remainder of the Maritimes Control Area.

Id. at PP 33-34 (internal citations omitted).

The MPUC respectfully requests that the Commission reconsider its strict application of the Interim Screen Order and Order 697 in the instant situation, and find that continuation of Boralex's market-based rate authority is inappropriate at this time in northern Maine. Although Order 697, and its predecessor, the Interim Screen Order, require that "[a]ny proposal to use an alternative geographic market (*i.e.* a market other than the default geographic market) must include a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market,"[8] this standard is not appropriate in the instant case, and applying it would allow for unjust and unreasonable rates in northern Maine.

While the Commission's requirement that any proposal to use an alternative geographic market include "a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market"[9] addresses the most common factual circumstance that results in the inability of competing supply to reach

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8 *Id.* at P 268.

9 *Id.*

customers, it does not address the situation in northern Maine, in which there are reasons *other than* transmission constraints that prevent competing supply from reaching customers.

Most notably, the Maritimes Control Area is *not* a market, thus, it cannot be used as the default geographic market for the Commission's indicative screen tests. There is little competition across, or even within, the Maritime Canadian Provinces, or between the Provinces and northern Maine. Thus, the Commission's requirement that the MPUC demonstrate the existence of a transmission constraint between Northern Maine and New Brunswick is illogical, because it *assumes* a fiction-- that there is a competitive market in New Brunswick.

However, even if there were competitive supply in the Maritimes Control Area, and there is not, as discussed above and in the MPUC pleadings, there was sufficient additional information for the Commission to conclude that northern Maine should be used as the relevant geographic "market." As noted in the MPUC's prior pleadings: (1) there are no comprehensive market rules governing the Maritimes Control Area and northern Maine[10] in the Maritimes Control Area (or even between New Brunswick, Canada and northern Maine); (2) there is insufficient liquidity of supply in the Maritimes Control Area; and (3) provincial native loads are given preference by New Brunswick Power, which is a Crown Corporation. In essence, northern Maine is within a control

10 The Commission concludes that the fact that New Brunswick System Operator is the Balancing Authority for the NMISA undercuts the MPUC argument that NMISA has a separate "market" from New Brunswick's. However, New Brunswick's role as a balancing authority, which is a *reliability* function, does not affect whether there is sufficient competitive supply available to northern Maine from New Brunswick. In fact, the evidence provided by the MPUC indicates that such supply is not available.

area that is not itself a competitive market. Thus, the strict application of the criteria set forth in screens by both the Interim Screen Order and Order 697 neither addresses nor resolves the lack of a competitive market in northern Maine and the unjust and unreasonable prices that result from allowing market-based rate authority where there is no functioning market.

In addition, as explained in detail in the MPUC's prior pleadings in this proceeding, and during the technical conference held by the Commission, northern Maine is small and electrically isolated from the closest functional market, ISO-NE, such that competition from supply in ISO-NE is precluded. The Commission dismisses this evidence, in part with reference to the construction of the Northern Reliability Interconnect which will increase transfer capability between New Brunswick and *ISO-NE,* but which does not provide a direct connection between ISO-NE and Northern Maine. *See* Notice of Intervention and Comments of the Maine Public Utilities Commission at 5. FERC concludes, without explanation, that this line "presumably" makes it "easier for suppliers in ISO-NE to sell in Northern Maine,"[11] but does not explain why this is so in the absence of a direct connection between ISO-NE and northern Maine. Thus, FERC has failed to address the MPUC arguments that northern Maine is electrically isolated from ISO-NE. In fact, FERC's own finding that ISO-NE is a second tier market[12] supports the MPUC argument that northern Maine is electrically isolated from ISO-NE.

The evidence presented by the MPUC in its prior pleadings on these points is further supported in a filing made at the MPUC by Constellation Energy Group ("CEG"),

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11 January 17 Order at P 39.

12 *Id.* at P 44.

pursuant to the October 30, 2007 Request for Comment in MPUC Docket 2006-513.[13] As explained in its Comments, CEG is a wholesale supplier of electric power to many of New England's electric utilities in connection with either their standard offer or default service obligations. In Maine, the company is currently serving portions of Central Maine Power Company's ("CMP's") and Bangor Hydro Electric Company's ("BHE's") residential and small commercial Standard Offer Service ("SOS"), and all of BHE's large SOS.

In its Comments, CEG describes the lack of competition and the isolated load in Northern Maine:

> Ostensibly, a potential supplier can access three avenues to bring power into the northern Maine market; but, because of this market's isolated nature, the utility of these options is substantially limited. First, a supplier could purchase power within the Northern Maine ISA ("NMISA"). *However, this is a small, highly illiquid market with limited resources and concentrated generation ownership.* Second, a potential supplier could buy power from within the New Brunswick system. However, there are few sellers within the New Brunswick control area and northern Maine is already dependent on service from the New Brunswick system. Finally, a supplier could wheel power in from NEPOOL. However, as the Commission correctly recognized, MPS is outside of ISO-NE. Consequently, it must be scheduled as outside load and MPS remains two wheels away from the rest of the New England market. Potential suppliers must therefore overcome the issues of cost and availability of arranging transmission: (1) out of ISO-NE to New Brunswick and (2) from New Brunswick into the MPS Service Territory. While these problems are not insurmountable, they do make serving load in northern Maine a very different task from serving load within the NEPOOL Control Area.[14]

The MPUC believes that these statements by CEG provide a supplier's perspective insight into the isolated, non-competitive environment for electricity in northern Maine.

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13 *See* Attachment 1.

14 *Id.* at 2 (emphasis added).

Given the extraordinary circumstances and the clear market failure that exist in northern Maine, market-based authority should not be granted without an in-depth examination by the Commission of whether such authority could result in rates that are not just and reasonable. As noted in the Interim Screen Order:

> If an applicant passes both screens, there will be a rebuttable presumption that the applicant does not possess market power in generation. However, we will allow intervenors to present evidence to rebut the presumption under these circumstances. For example, intervenors could present evidence based on historical wholesale sales data and/or challenge our assumption that competing suppliers inside a control area have access to the market (such a challenge could take into account both the actual historical transmission usage at the time of the study as well as the amount of available transmission capacity at that time). On the other hand, if an applicant fails either screen, this will create a rebuttable presumption that market power exists in generation.[15]

Moreover, as noted by the MPUC in prior filings, Boralex fails the market share screen when its committed capacity is not deducted. In the instant case, whether or not Boralex has market-based rate authority is not even a material issue for consumers in northern Maine until the committed capacity is no longer committed. The output of the Boralex plants in northern Maine, Boralex Ft. Fairfield and Boralex Ashland, is currently under contract at fixed prices. Thus, the issue becomes material only when the existing contracts expire in February 2009 (less than a year away). Until then, prices for the output from the Boralex plants are locked in pursuant to contract, and whether or not Boralex has high market share or is a pivotal supplier is largely an academic question. If the screen analysis is to have any practical meaning, it must reasonably represent conditions at the time Boralex will next be in a position to offer for sale the output of its northern Maine plants. These conditions can be represented accurately only by deducting

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15 Interim Screen Order at P 37.

the capacity of the plants for which the commitments will have terminated, the very same plants from which *Boralex would then be offering to sell at market-based rates*. While the Commission states that historical data is more objective, and less subject to manipulation, it does not explain how this concern is relevant to the certain termination of the contracts in less than a year's time. In contrast to the Commission's experience in other jurisdictions, in the instant case there is sufficient objective and readily available information to do so, and, pursuant to Order 697, the Commission has given itself the option of doing so if it finds that "extraordinary circumstances" exist.[16] The MPUC believes that the evidence so indicates.

Finally, stepping back from the technical arguments about how the market power screen tests should be applied, it is clear that there is a problem in terms of competition in northern Maine. In the January 17 Order, the Commission has failed to look beyond the technical requirements of the Interim Screen Order or Order 697 to discern the proper course of action when a market fails to develop, as is the case here. This failure, evidenced in the Commission's decision to permit Boralex to continue to charge market-based rates in northern Maine, in spite of northern Maine's clearly dysfunctional "market," results in rates that cannot be determined to be just and reasonable, since they are neither regulated cost-based rates nor are they the result of a competitive market.

For all of the reasons set forth above, the MPUC respectfully requests that the Commission reconsider its decision to permit Boralex to continue to enjoy market-based rate authority in northern Maine.

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16 Order 697 at P 38, fn. 18.

V. CONCLUSION

WHEREFORE, the Maine Public Utilities Commission requests that the Commission grant the relief requested hereinabove.

Dated: February 19, 2008

Respectfully submitted,

/s/ Lisa S. Gast
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ATTACHMENT A

Constellation Energy Group

November 30, 2007

ELECTRONICALLY FILED ON NOVEMBER 30, 2007

Ms. Karen Geraghty
Administrative Director
Public Utilities Commission
242 State Street
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Augusta, ME 04333-0018

Re: Docket 2006-513, Standard Offer Bidding Procedure and Inquiry into Northern Maine Markets

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Dear Ms. Geraghty:

Pursuant to the October 30, 2007 Request for Comment in Docket 2006-513, Constellation Energy Commodities Group, Inc. ("CCG") and Constellation NewEnergy, Inc. ("CNE"), (collectively "Constellation") are pleased to provide the following comments on the Maine Public Utilities Commission ("Commission") standard offer bidding procedure and inquiry into the northern Maine markets.[1]

CCG is a wholesale supplier of electric power to many of New England's electric utilities in connection with either their standard offer or default service obligations. Specifically, the company is currently serving portions of Central Maine Power Company's ("CMP's") and Bangor Hydro Electric Company's ("BHE's") residential and small commercial Standard Offer Service ("SOS") and all of BHE's large SOS. CNE is a licensed retail supplier in 17 states, including Maine, and two Canadian provinces. CNE currently provides over 15,000 MW of electrical supply directly to businesses throughout the country for their own use, including hundreds of customers in Maine. Both companies are subsidiaries of Constellation Energy Group, Inc., a Fortune 200 company headquartered in Baltimore, Maryland, which also owns Baltimore Gas and Electric Company, a regulated utility.

<u>Comments</u>

Constellation appreciates the opportunity to participate in this docket and offer these comments on the Commission's efforts to explore solutions to the problem of lack of competition in northern Maine.

Preliminarily, Constellation agrees with the Commission that the installation of a new transmission line linking northern Maine with ISO-NE is the only practical long-term solution that will facilitate competition in the northern Maine area. Until such a line is constructed, the northern Maine market will remain electrically isolated from the rest of the New England market.

In the meantime, the Commission should be commended for exploring potential interim solutions (such as the current proposal for aggregating northern Maine and BHE standard offer load) until a new transmission line can be installed. However, it must be emphasized that until a new line can be built, the issue remains complex and the Commission will have to address these complexities as it structures any interim solution.

Isolated Load

Ostensibly, a potential supplier can access three avenues to bring power into the northern Maine market; but, because of this market's isolated nature, the utility of these options is substantially limited. First, a supplier could purchase power within the Northern Maine ISA ("NMISA"). However, this is a small, highly illiquid market with limited resources and concentrated generation ownership. Second, a potential supplier could buy power from within the New Brunswick system. However, there are few sellers within the New Brunswick control area and northern Maine is already dependent on service from the New Brunswick system. Finally, a supplier could wheel power in from NEPOOL. However, as the Commission correctly recognized, MPS is outside of ISO-NE. Consequently, it must be scheduled as outside load. and MPS remains two wheels away from the rest of the New England market. Potential suppliers must therefore overcome the issues of cost and availability of arranging transmission: (1) out of ISO-NE to New Brunswick and (2) from New Brunswick into the MPS Service Territory. While these problems are not insurmountable, they do make serving load in northern Maine a very different task from serving load within the NEPOOL Control Area.

[1] Constellation previously consulted with and received consent from Commission Staff to file by November 30, 2007.

Uncertainty About Available Resources

Next, unlike the NEPOOL market, the limited size and lack of resources in the NMISA market leaves potential bidders uncertain at to the scope of their potential exposure and responsibility in the following areas:

1. Balancing

   While there is a balancing mechanism in place in the NMISA market, there are insufficient resources in the area to balance resources with load at bid-based rates. Bidders therefore will need to understand where the NMISA procures the necessary supply and how it prices real-time balancing services under its tariff in order for them to offer forward pricing.

2. Ancillary Services

   Neither is there a developed bid-based ancillary services market in the northern Maine area. Hence the same concerns respecting transparency and liquidity of NMISA balancing services apply to ancillary services as well.

3. Renewable Energy

   Potential suppliers also face uncertainty as to how their delivery into northern Maine would affect their obligations vis-à-vis renewable energy credits. Guidance from the Commission in this area would be very helpful..

Thus, if the Commission implements its proposed interim solution, there is considerable information that needs to be made available to potential outside suppliers to formulate meaningful SOS load bids in the NMISA area. Consequently, the most appealing approach for Constellation would be to make a simple offer to sell MPS load following, energy-only services at the Keswick Node (i.e. New Brunswick border with the ISO-NE). Concededly, this is not the full-requirements product that the Commission desires, but until more is known and the current uncertainty is minimized, NEPOOL suppliers such as Constellation will be better able to add value in a structure that minimizes their need to fully understand and participate within the NMISA market and uses their NEPOOL capabilities to supply load-following energy.

Load Aggregation

Finally, the Commission proposes combining the BHE and MPS SOS loads to increase the economies of scale so as to enhance the potential bidding response. With two suggested modifications, Constellation supports the Commission's proposal. First, while the Commission would have only one solicitation for the combined BHE/MPS SOS load, Constellation instead recommends that there should be three separate solicitations: (i) one solicitation would be for the aggregated BHE/MPS load; (ii) one for the BHE load stand-alone; and (iii) one for the MPS load stand-alone. Second, no bidder should be required to bid on the combined BHE/MPS load as a condition of participation. As noted, many potential bidders are not be familiar with the NMISA market and would choose not to bid at all if required to bid on the aggregated load. With these changes in place, Constellation and other potential suppliers would have the option to offer bids in any or all of the solicitations. (Constellation notes that MPS made a similar suggestion in its comments filed on November 16, 2007). This methodology has a higher probability of stimulating more bidding in the northern Maine market than a single solicitation.

Please do not hesitate to contact us if you would like to discuss any portion of our comments, or need clarification on any issues addressed above.

Sincerely,

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On behalf of Constellation Energy Commodities Group, Inc.
and Constellation NewEnergy, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding either by U.S. Mail or electronic service, as appropriate. Dated at Washington, D.C., this 19th day of February, 2008.

/s/ Harry A. Dupre
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